82-126

No.

Office-Supreme Court, U.S.
FILED
JUL 21 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

ASADOOR SOOJIAN, et al.,
Petitioners,

vs.

JOHN R. DONALDSON, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

WILLIAM M. HARDY
COUNSEL OF RECORD
1425 Park Avenue
San Jose, California 95125
(408) 275-6507

CLARK A. BARRETT
1611 Borel Place, Suite 6
San Mateo, California 94402
(415) 349-6354
Attorneys for Petitioners

BOWNE-PERNAU WALSH • 180 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

In 1971 the Planning Department of Fresno County, California granted to Petitioner Asadoor Soojian its "Site Plan Review No. 1507" authorizing the construction of a 264 space mobile home park on 33 acres. This document referred to itself internally as "this permit". The Site Plan expressly stated: "this approval is *final*" and authorized the *construction, without any further building permits*, of substantial improvements including underground utilities, grading, asphalt road, drainage, slabs for trailers, masonry walls and other improvements which constituted almost all of the expenses of creating this mobile home park. Only relatively incidental expenses relating to the construction of small structures for restrooms and laundry facilities required separate building permits. In reliance on this permit, and a separate additional permit obtained from the State of California, Petitioner cleared the entire 33 acre site of producing grape vines having a value in excess of $80,000.00, and thereafter expended more than $100,000.00 in completing almost all of Phase I of the mobile home park. These improvements consisted of the entire sewer system, including trenching to a depth of 12 feet in some instances, the installation of sewer pipe to each separate trailer pad, and the connecting line to the Fresno County trunk sewer. The entire water system was likewise completed, including the completion of a well, installation of pumps, and separate water lines to each trailer space. More than one-half mile of utility pipes were installed. The improvements also included rough grading for the entire 33 acres, including the construction of drainage facilities and roads to such an extent that only black-topping remained for completion.

The Petitioner also constructed over one hundred feet of 6 foot high masonry walls, completed a portion of the landscaping, and had the engineering completed for the entire 33 acres. However, partly because of an injury to

himself, and partly because of financing, the Petitioner did not obtain structural building permits for the restroom or laundry facilities.

In 1977, *without any prior notice or opportunity to be heard*, the Department of Public Works, the Planning Department and the County Counsel of Fresno County sent a letter to the Petitioner stating that because, in their opinion, "substantial development" had not taken place, his site plan was, therefore, "deemed void."

The Petitioner was given 15 days to appeal this administrative action to the Fresno County "Board of Review," a non-elected group appointed by the Board of Supervisors. The Board of Review affirmed the action of the administrative staffs in revoking Petitioner's Site Plan Permit, on the *sole* ground that "substantial development" had *not* taken place.

Petitioner then appealed to the Board of Supervisors, although he attacked the jurisdiction of the Board of Supervisors to hear such a matter, as there was literally nothing in the Fresno County ordinances authorizing such a procedure by which permits could be "voided" *without prior notice or hearing*, and there was no statutory definition of what "substantial development" was. The Board of Supervisors upheld the revocation of the Site Plan by a 3-1 vote, notwithstanding an express finding, *contrary* to the Board of Review, that there had, indeed, been "substantial development as to Phase I."

Petitioners then brought suit for monetary damages against the individual members of the Board of Supervisors and others, for violation of their rights to due process and the Civil Rights Acts. The District Court of the Eastern District of California adopted a magistrate's findings and granted Respondents' motions for summary judgment and dismissal of the Complaint. The Ninth Circuit Court of Appeals affirmed.

The questions presented are:

1. When property owners have, pursuant to a final permit granting approval for commencement of construction, employed engineers, cleared 33 acres of valuable, income-producing crops; completed on-site surveying and staking; completed rough and final grading for streets and drainage; trenched, installed, back-filled and compacted over half a mile of sewer and water pipes, with connecting laterals, for the entire Phase I of a mobile home park; constructed over one hundred feet of 6 foot high masonry walls; and developed part of the landscaping, all of which had a value of almost $200,000.00, did they not thereby acquire a "vested interest" in the property so as to preclude arbitrary cancellation of their right to continue to construct the project?

2. Is the above-stated vested right protected by the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution?

3. Is the voiding of such property rights by Fresno County, as confirmed by the Court of Appeals, a "taking" of property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

4. Is the procedure followed by Fresno County in having an administrative "voiding" without prior notice or opportunity to be heard, followed by a Board of Supervisors' review, compatible with procedural due process?

5. Is the utilization of a standard of alleged lack of "substantial development," when used as a basis to destroy vested rights, in a situation in which there was no statutory or other definition of "substantial development," an unconstitutionally vague standard not consistent with the concepts of due process and fair play?

6. Is the Opinion of the Ninth Circuit Court of Appeals contrary to the rulings of this Court as to what constitutes a "taking" as set forth in *Penn Central Transportation Company v. City of New York*, 38 U.S. 104, 57 L.Ed. 631, 98 S.Ct. 2646 (1978), and *Dobbins v. Los Angeles*, 195 U.S. 23, 49 L.Ed. 169 (1904)?

7. Was it proper for the Ninth Circuit Court of Appeals to sustain the dismissal of Petitioners' Complaint for violation of their rights under the Fifth and Fourteenth Amendments, and the Civil Rights Acts, in the light of this Court's decision in *Maine v. Thiboutot*, 448 U.S. 1, 65 L.Ed. 2d 555, 100 S. Ct. 2502 (1980), holding that *all* claims alleging deprivation of *any* federal right, Constitutional or statutory, constitute causes of action under 42 U.S.C. Sec. 1983?

8. May the self-executing provisions of the Fifth and Fourteenth Amendments, and personal rights protected by the Civil Rights Acts, be absolutely thwarted and made a nullity by the granting of a motion for summary judgment *after* the Defendants had acknowledged in writing that *ten triable issues of fact existed* and *before* the Plaintiffs received answers to timely-filed interrogatories and had an opportunity to take previously scheduled depositions?

9. When a cause of action for conspiracy under 42 U.S.C. Sec. 1985(3) is alleged in a verified Complaint against individual defendants, do those defendants have absolute or qualified immunity by virtue of being county employees?

PARTIES TO THE PROCEEDINGS

Petitioners:

Asadoor Soojian
Sharline Soojian
Manoog Soojian
Hagop Soojian
Irene Soojian
Tanny Soojian
Deborah Soojian
Sarkis Soojian
Tara Soojian
Tanya Soojian
as co-partners

Respondents:

John R. Donaldson
John Ventura
Bruce Bronzan
Sharon Levy
Leo Wilson
Manuel Lopez
J. Harold Carter
Ed Darden, Sr.
Wayne Dominick
Glee Ewell
Sally Fosse
Donald Schafer
Robert M. Wash
J. Steven Lempel
Floyd R. B. Viau
Bill Carmichael
Don Pauls
Donald Livingston
Walter Clark
John Weaver
Tom Harper
(employees or representatives of Fresno County)

TABLE OF CONTENTS

	Page
Questions presented	i
Parties to the proceeding	v
Opinions and decisions below	1
Jurisdiction	2
Constitutional provisions, statutes and ordinances	3
Statement of the case	3
Reasons for granting the writ	11
A. The law as to what constitutes "vesting" and "taking" under the Fifth and Fourteenth Amendments is unsettled	11
B. Petitioners' property rights had "vested" prior to Fresno County's action in revoking their permit	14
C. The action of Fresno County in revoking the petitioners' right to complete their mobile home park was an unconstitutional "taking"	18
D. The opinion of the Ninth Circuit Court of Appeals is directly contrary to this court's decision in *Dobbins v. Los Angeles*	21
E. The Opinion of the Ninth Circuit Court of Appeals is directly contrary to this Court's decision in *Maine vs. Thiboutot*	22
F. Fundamental Constitutional and statutory civil rights should not be nullified by the device of granting a motion for summary judgment, and dismissal of a complaint, before the opportunity of discovery under the Rules of Civil Procedure can be availed of	23
G. The Respondents, charged with violation of Constitutional rights and the Civil Rights Acts, including individual conspiratorial conduct, must be responsible in damages	25
Conclusion	26

INDEX TO APPENDIX

Page

Appendix A

Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit, Affirming the Decision of the United States District Court for the Eastern District of California, Granting Respondents' Motions for Summary Judgment and Dismissal of Petitioners' Complaint, No. 79-4501, March 12, 1982 ..... A-1

Appendix B

Judgment of the United States District Court for the Eastern District of California Granting Respondents' Motion for Summary Judgment and Dismissal of Petitioners' Complaint, No. F-78-93-Civ., July 12, 1979 ..... A-6

Appendix C

Order of the United States District Court for the Eastern District of California granting Respondents' Motions for Summary Judgment and Dismissal of Petitioners' Complaint, No. F-78-93-Civ., July 12, 1982 ..... A-7

Appendix D

Recommendations of Magistrate Appointed By United States District Court of the Eastern District of California on Respondents' Motions for Summary Judgment and Dismissal of Petitioners' Complaint, No. F-78-93-Civ., April 12, 1979 ..... A-8

Appendix E

Petitioners' Objections to Magistrate's Findings, Conclusions and Recommended Decision, United States District Court for the Eastern District of California, No. F-78-93-Civ., April 23, 1979 ..... A-12

Index to Appendix

Page

Appendix F

Order of the California Supreme Court denying Appellants' Petition for Writ of Review, Fifth District, Civil No. 5066, March 3, 1982, in the companion case entitled Soojian, Plaintiff and Appellant, vs. County of Fresno, et al., Defendants and Respondents A-34

Appendix G

Order of California Court of Appeal, Fifth Appellate District, denying Petitioner's Petition for Rehearing, 5 Civil No. 5066, January 6, 1982, in the companion case entitled Soojian, Plaintiff and Appellant, vs. County of Fresno, et al., Defendants and Respondents A-35

Appendix H

Opinion of California Court of Appeal, Fifth Appellate District, 5 Civil No. 5066 in the companion case of Soojian, Plaintiff and Appellant, vs. County of Fresno, et al., Defendants and Respondents, December 9, 1981 ..... A-36

Appendix I

Judgment of the Superior Court of the State of California for the County of Fresno in the companion case of Soojian, Petitioner, vs. County of Fresno, et al., Defendants, Superior Court No. 227791-1, June 19, 1979 ..... A-68

Appendix J

Findings of Fact and Conclusions of Law adopted by the Superior Court of the State of California in the companion case of Soojian, Petitioner, vs. County of Fresno, et al., Respondents, No. 227791-1, June 19, 1979 ..... A-69

Index to Appendix

Page

Appendix K

Findings of Fact, Conclusions of Law, which incorporate the Decision of the Board of Supervisors of Fresno County, California, in the Appeal of Soojian from the action of the Fresno County Board of Review, Index No. 78-463, March 6, 1978 ..... A-80

Appendix L

Letter from County Counsel of Fresno County, California, determining that Soojian's Site Plan No. 1507 "is deemed void," March 1, 1977 ..... A-91

Appendix M

Permit for 264-space mobile home park issued by Planning Department of Fresno County, California, to Soojian, Site Plan Review No. 1507, September 1, 1971 ..... A-93

Appendix N

2 Permits for Construction of mobile home park and wash building, issued by State of California, Department of Housing and Community Development, Division of Codes and Standards, to Soojian, December 18, 1972, and extension thereof to June 18, 1974 ..... A-98

Appendix O

California Health and Safety Code, Sections 18500 (a), 18501 and 18509; California Public Resources Code, Sections 21065(c), 21167(a) and 21169 ..... A-101

TABLE OF AUTHORITIES CITED

Cases

Page

Agins v. City of Tiburon, 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980) 15, 19, 23

Aries Dev. Co. v. California Coastal Zone Conservation Comm., 48 Cal.App.3d 534, 122 Cal.Rptr. 315 (1975) 18

Avco Community Developers, Inc. v. South Coast Regional Commission, 17 Cal.3d 785, 132 Cal.Rptr. 386 (1976) cert. denied, 430 U.S. 952, 51 L.Ed.2d 801, 97 S.Ct. 1594 (1977) 13, 14, 16

Dobbins v. Los Angeles, 195 U.S. 23, 49 L.Ed. 169 (1904) ..... iv, 8, 15, 16, 21

Friends of Lake Arrowhead v. San Bernardino County Board of Supervisors, 38 Cal.App.3d 497, 113 Cal. Rptr. 539 (1974) 18

Kaiser Aetna v. United States, 444 U.S. 164, 62 L.Ed. 2d 332, 100 S.Ct. 383 (1979) 19, 23

Maine v. Thiboutot, 448 U.S. 1, 65 L.Ed.2d 555, 100 S.Ct. 2502 (1980) ..... iv, 22, 23, 27

Nashville, C. & St. L.R. Co. v. Walters, 294 U.S. 405, 79 L.Ed. 949, 555 S.Ct. 478 (1935) 21

Owen v. City of Independence, 445 U.S. 622, 63 L.Ed. 2d 673, 100 S.Ct. 1398 (1980) 25, 26

Penn Central Transportation Company v. City of New York, 438 U.S. 104, 57 L.Ed. 631, 98 S.Ct. 2646 (1978) ..... iv, 12, 13, 23

Raley v. Cal. Tahoe Regional Planning Agency, 68 Cal.App.3d 965, 137 Cal.Rptr. 699 (1977) 18

San Diego Gas & Electric Company v. City of San Diego, 450 U.S. 621, 67 L.Ed.2d 551, 101 S.Ct. 1287 (1981) 12, 23

Table of Authorities Cited

Cases

Page

Wood v. Strickland, 420 U.S. 308, 43 L.Ed.2d 214, 95 S.Ct. 992 (1975) 25

Constitution

United States Constitution:

Fifth Amendment ..... iii, iv, 3, 8, 9, 11, 21, 22, 25

Fourteenth Amendment ..... iii, iv, 3, 8, 9, 11, 21, 22, 25

Statutes

California Government Code:

Section 25042 25

California Health & Safety Code:

Section 18500(a) 3, 4

Section 18501 ..... 3, 4

Section 18509 3

California Public Resources Code:

Section 21065(c) 3

Section 21167(a) 3, 6

Section 21169 ..... 3, 6

Rules

Rules of the Supreme Court, Rule 17.1(a) and (c) 3

28 U.S.C.:

§ 1254(1) 3

§ 1331 ..... 3, 9, 25

§ 1343 3

42 U.S.C.:

§ 1983 ..... iv, 3, 9, 23, 25

§ 1985(3) ..... iv, 3, 9, 25

§ 1986 ..... 3, 9, 25

Table of Authorities Cited

Rules

	Page
Federal Rules of Civil Procedure:	
Rules 26-37	23
Rule 30	24
Rule 33	24
Rule 56(b)	24
Rule 56(c)	24
Rule 56(e)	24

Texts

Note, 94 Harvard L.R. 1 (Nov., 1980)	12
Joseph Sax, Takings and the Police Power, 74 Yale Law Journal 36 (1964)	12
Williams, American Law, Land Use and the Planning Power, Volume I, Section 4.04, pages 93-94	12
94 Harvard L.R. 229, The Supreme Court, 1979 Term p. 229	23

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

ASADOOR SOOJIAN, et al.,
Petitioners,

VS.

JOHN R. DONALDSON, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners Asadoor Soojian and others, as co-partners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on March 12, 1982.

OPINIONS AND DECISIONS BELOW

On March 1, 1977, without any prior notice or hearing, the office of the County Counsel of Fresno County, acting in conjunction with the Department of Public Works and the Planning Department, notified Petitioner, Asadoor Soojian that his permit to construct a 263 space mobile home park (Site Plan Review No. 1507, issued September 1, 1971) was "deemed void" (Appendix L), notwithstanding his expenditure of hundreds of thousands of dollars of funds and property in reliance on said permit. Following an appeal by said Petitioner, the Board of Review of Fresno County affirmed the act of revoking the above-mentioned permit on May 4, 1977. The Board of Super-

visors of Fresno County thereafter affirmed the decision of the Board of Review by its decision on March 6, 1978. (Appendix K)

Petitioners filed a Complaint for monetary damages against members of the Fresno County Board of Supervisors, and others, for violation of their constitutional rights and deprivation of civil rights in an action entitled Soojian, et al., Plaintiffs, vs. Donaldson, et al., Defendants, in the United States District Court for the Eastern District of California, No. F-78-93-Civ. The action terminated in the granting of Respondents' motions for summary judgment and dismissal of the Complaint by District Court Order (Appendix C), and Judgment (Appendix B) on July 12, 1979.

Following an appeal, the Court of Appeals for the Ninth Circuit in Soojian, et al., Plaintiffs-Appellants, vs. Donaldson, et al., Defendants-Appellees, No. 79-4501, issued its Memorandum Opinion affirming the District Court judgment on March 12, 1982. This Opinion is unreported. (Appendix A)

JURISDICTION

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit affirming the granting of the Respondents' motions for summary judgment and dismissal of the Complaint was filed March 12, 1982. This opinion is unreported. (Appendix A) An Order extending time to file a Petition for Writ of Certiorari to June 30, 1982 was made by Justice Rehnquist on May 24, 1982. The time was further extended by said Justice until July 21, 1982 by an Order dated June 22, 1982.

The grounds for the granting of this Petition for Certiorari are (1) that the Court of Appeals for the Ninth Circuit has decided questions involving the United States Constitution and statutes in a way in conflict with applicable decisions of this Court; (2) that said Court has decided important questions of Federal Constitutional and

statutory law which have not been, but should be, settled by this Court; and (3) that said Court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1) and Rule 17.1(a) and (c) of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

California Health and Safety Code, Sections 18500(a), 18501 and 18509; California Public Resources Code, Sections 21065(c), 21167(a) and 21169. See Appendix O.

STATEMENT OF THE CASE

The District Court for the Eastern District of California had jurisdiction to hear and determine the Petitioners' Complaint by virtue of the self-executing provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States; 28 U.S.C. Sec. 1331; and 28 U.S.C. Sec. 13113, as said Complaint set forth causes of action arising out of rights protected by the Fifth and Fourteenth Amendments, and 42 U.S.C. Sec. 1983, 42 U.S.C. Sec. 1985(3) and 42 U.S.C. Sec. 1986.

On September 1, 1971, the Planning Department of Fresno County, California, issued to Petitioner Asadoor Soojian its "final" "Site Plan Review No. 1507." Although designated a Site Plan, it was, under the laws of the State of California and Fresno County, an actual "permit" to construct a 264-space mobile home park, and was designated, in its internal provisions, as "this permit." (Appendix M) Under this permit, no further building permits of any kind or character were required for engineering; staking; rough and final grading; drainage; construction of streets, including base and asphalt; 290 off-street parking spaces;

hundreds of feet of masonry wall 6 feet in height; all underground sewer and water lines; and landscaping. (Appendix M) (Testimony of Planning Department official, Robert H. Greve, Transcript p. 726)

In order to obtain this permit Petitioner had to submit a written application which contained an unconditional offer of dedication of the easterly 20 feet of the property to Fresno County as a right of way for road purposes. In addition, the application incorporated a "site development plan;" set forth in detail the location of every street; every parking place; every mobile home base; and a detailed description and location of each structure. This site development plan was stamped "approved" by the Planning Department prior to issuance of the above permit on September 1, 1971. The granting of this permit was evidence that Petitioner had complied with all of the requirements of the Fresno County Zoning Ordinance relating to the construction of a mobile home park on land then zoned A-1 which zoning permitted, as a matter of right, the construction of a mobile home park.

On September 22, 1972, more than one year later, Site Plan No. 1507 was revised and officially approved by the Planning Department. This second approval confirmed the September 1, 1971 approval, but reduced the number of mobile home spaces authorized from 264 to 263 spaces.

In addition, in 1972 Petitioner submitted an application for two additional building permits to the State of California Department of Housing and Community Development, one to construct a 16 foot by 30 foot wash building, and the other to construct a 28 space mobile home park, representing "Phase I" of the entire 33 acre project. The applications were in complete compliance with sections 18500(a) and 18501 of the California Health and Safety Code which provided, in part, that such applications "shall be accompanied by:

(a) A description of the grounds.

(b) *Plans and specifications of the proposed construction.*

(c) A description of the water supply, ground drainage and method of sewage disposal.

(d) Appropriate fees.

(e) *Evidence of the compliance with all valid local planning, health, utility and fire requiremenis."*

These two permits were issued by the State of California on December 18, 1972, thus confirming Petitioner's compliance with all of the above-mentioned requirements. (Appendix N)

Each of these permits was thereafter extended to June 18, 1974.

Site Plan No. 1507 remained in full force and effect until the Board of Supervisors of Fresno County, by a 3-1 vote, revoked it on March 6, 1978.

During the time the three permits were in full force and effect, and acting in complete reliance on each of them, Petitioner incurred economic losses and expended and incurred indebtedness of more than $200,000.00 including the following:

(1) Clearing the entire 33 acres site of existing, producing grape vines having a value of $82,000.00;

(2) Cost of removing grape vines, $3,000.00;

(3) Grading to the point of finished grade, $3,500.00;

(4) Hauling away 880 tons of dirt, $2,400.00;

(5) Headers for asphalt streets, and concrete forms and rebars, and labor for 128 feet of 6 foot masonry wall, $8,400.00;

(6) Off site engineering, $41,000.00;

(7) On site surveying, staking, leveling, engineering and establishing grades, $22,000.00;

(8) Constructing a new well 240 feet deep, 14 inches in diameter, including pump and electrical units and water pressure tank, $18,500.00;

(9) Installation, including trenching, installing, backfilling and compacting of 1,430 feet of sewer pipe and 1,400 of water pipe, including excavation to a depth of 12 feet in some areas to obtain gravity flow for sewer system, running of sewer line to Fresno County trunk sewer, and construction of vertical pipes for both sewer and water system to each and every trailer space in Phase I, $22,000.00;

(10) Landscaping, $1,500.00.

Total $204,300.00

The above-mentioned well and water pressure system were inspected, approved, and "signed off" by State of California representatives.

On December 5, 1972, the sections of the Public Resources Code of the State of California containing the provisions of the California Environmental Quality Act of 1970 became effective. However, section 21169 of the Public Resources Code stated that any project "undertaken, carried out or approved on or before the effective date of this section and the issuance by any public agency of any . . . permit is hereby confirmed, validated and declared legally effective." (See Appendix O, p. A-102) Petitioner's project was not subject to the CEQA, as the permit contained in Site Review No. 1507 had been granted *more than 15 months before* the effective date of this legislation, and substantial construction had been undertaken prior to the effective date.

A separate ground that the Petitioner's project was *not* barred by the above-mentioned Environmental Quality Act of 1970 is that section 21167(a) of the Public Resources Code provides that any action to attack, review, set aside, void or annul acts or decisions of the public agency on the grounds of non-compliance with this division shall be

commenced within 180 days of the public agency's decision to carry out or approve the project or within 180 days after *commencement* of the project. Therefore, even if it could be asserted that the Environmental Quality Act applied as of December 5, 1972, any action to attack or void the Petitioner's project would have had to be commenced by the appropriate public agency *no later* than June 5, 1973. *No such action was taken.*

On August 15, 1974, Fresno County Zoning Ordinance Section 874-A-7 was amended to include the following language:

> "An approved site plan shall become void when substantial development has not *commenced* within one year after the approval of the site plan."

Notwithstanding the obvious fact that substantial development was *commenced* within one year of the *approval* of the site plan on *September 1, 1971*, the Board of Supervisors erroneously determined that the "commencement" date should be that of August 15, 1974, and further, erroneously determined that there was not "substantial development" between August 15, 1974 and August 15, 1975.

Moreover, the adoption of the change of zoning did not, and could not under California law, retroactively operate to revoke the approval of projects previously approved and under construction.

On September 30, 1976, long *after* Petitioner had expended over $200,000.00 on the project, the subject property was rezoned from A-1 to AE-20. The latter zoning was defined as exclusively agricultural; mobile home parks are not permitted in any AE zone district.

Although the Petitioner had completed approximately 80 percent of the total construction of Phase I of the mobile home park, as a result of an injury which precluded his supervision of this construction for an extended

period of time and because of certain financing delays, the above-mentioned wash building (which, according to the building permit, was to cost only $6,000.00), and a separate structure consisting of restrooms were not constructed. However, unlike the usual residential or commercial development in which the major costs of the development are incurred and spent *after* a building permit has been obtained from the appropriate agency, and the residential or commercial buildings thereafter constructed, as to a mobile home park virtually all of the construction expense consists of non-structural improvements, and only very minor, almost insignificant, expenses relate to structures such as laundry and restroom facilities.

On March 1, 1977, *without any prior notice or hearing*, the Office of the County Counsel of Fresno County, acting in conjunction with the Department of Public Works and the Planning Department of said County, addressed a letter to the Petitioner advising him that his "Site Plan Review No. 1507 . . . is deemed void," because they were of the opinion that "substantial development has not taken place on such site so as to create a vested right to complete the project." (Appendix L) There is *no* provision in the Fresno County Ordinance for such a determination in advance by County departments.

Petitioner appealed to the Board of Review of Fresno County objecting to the voiding of his Site Plan No. 1507, raising both California and United States Constitutional objections under the Fifth and Fourteenth Amendments, and the decision of this Court in *Dobbins v. Los Angeles*, 195 U.S. 223, 49 L.Ed. 169 (1904). On May 4, 1977, the Board of Review upheld the decision of the administrative agencies in revoking the Site Plan.

Petitioner then appealed to the Board of Supervisors of Fresno County, although he attacked the jurisdiction of the Board of Supervisors to hear the matter in the manner in which it had been raised and, in addition, presented

substantial oral and documentary evidence concerning the amount of construction performed under the permits and the value thereof. In addition, Petitioner raised substantial Federal and California Constitutional issues, and alleged that the revocation of his Site Plan, or an administrative determination not to permit the construction to continue, would be a violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution, and an illegal taking of his property without due process of law. The Board of Supervisors affirmed the decision of the Board of Review by its 3-to-1 decision on March 6, 1978. (Appendix K)

Although Petitioner disagreed with other conclusions of the Board of Supervisors, the Board of Supervisors did find, in its Conclusion No. 7, that as of August 15, 1975, there was substantial development of Phase I of the site. This was *contrary* to the decision of the Board of Review, and the alleged *lack* of substantial development was the *only* reason the Board of Review upheld the revocation of the Site Plan.

Petitioners, as co-owners of the property in question, immediately filed a civil Complaint in the United States District Court for the Eastern District of California on May 1, 1978 (Soojian, et al., Plaintiffs, vs. Donaldson, et al., Defendants, No. F-78-93-Civ.), seeking monetary damages for deprivation of their rights to due process under the Fifth and Fourteenth Amendments of the United States Constitution and 28 U.S.C. Sec. 1331, and to redress violations of their civil rights under 2 U.S.C. Sec. 1983, 42 U.S.C. Sec. 1985(3) and 42 U.S.C. Sec. 1986.

Respondents thereafter made a motion for summary judgment and dismissal of Petitioners' Complaint, *notwithstanding the fact that they had stated in their Pretrial Statement that there were at least ten "Disputed Factual Issues!"* The District Court appointed a magistrate to make recommendations. At the hearing the mag-

istrate ruled that Respondents need *not* answer Petitioners' interrogatories (which had been timely served) and *denied* Petitioners' right to take depositions (which had been scheduled), which Petitioners intended to offer *in opposition to* the motion for summary judgment. Petitioners' request for a continuance was summarily denied.

The magistrate's recommendations were filed on April 12, 1979 (Appendix D). Petitioners objected to the magistrate's findings, conclusions, and recommended decision. (Appendix E) The District Court thereafter granted, by Order, the motion for summary judgment and for dismissal of the Complaint on July 12, 1979. (Appendix C) A District Court judgment was entered the same day. (Appendix B) This judgment is unreported.

Following an appeal to the United States Court of Appeals for the Ninth Circuit in Soojian, et al., Plaintiffs-Appellants, vs. Donaldson, et al., Defendants-Appellees, No. 79-4501, the Ninth Circuit issued its Memorandum Opinion affirming the District Court judgment on April 12, 1982. (Appendix A) This Opinion is likewise unreported.

This case is ancillary to, and a companion case with, that of Soojian v. Fresno County, brought in the California Superior Court for the County of Fresno, bearing case number A-996 in the 1981 term of this Court. Indeed, the cases are so intertwined that Appendices F through N, inclusive, of this Petition are identical to Appendices A-I, inclusive, of the Petition for a Writ of Certiorari in A-996.

In the companion case, Petitioner Asadoor Soojian's Petition for a Writ of Mandamus was rejected by a Judgment of the Superior Court of the State of California in Fresno County in an action entitled Soojian, Petitioner, vs. County of Fresno, et al., Defendants, Superior Court No. 2227791-1, on June 19, 1979. That decision is unre-

ported. (Appendix I) Findings of Fact and Conclusions of Law were also made. (Appendix J)

Following an appeal in that action, the California Court of Appeal, Fifth Appellate District, in Soojian, Plaintiff and Appellant, vs. County of Fresno, et al., Defendants and Respondents, No. 5 Civil 5066, issued its opinion affirming the Superior Court decision on December 9, 1981. That decision is unreported, as it was ordered not to be published by the Appellate Court. (Appendix H) The Court of Appeal denied a Petition for Rehearing without opinion on January 6, 1982. That order is unreported. (Appendix G)

On March 3, 1982, the California Supreme Court denied Appellant's Petition for Review in that action. That denial is unreported. (Appendix F)

Although this Petition for a Writ of Certiorari stands on its own merits, it is respectfully suggested that the Court consider the consolidation of this case, for purposes of hearing, with that of the Petition for a Writ of Certiorari in Soojian, Petitioner, vs. The County of Fresno, et al., Respondents, No. A-996, October Term, 1981, filed on or about June 1, 1982, because of the substantial identity of the parties and significantly similar issues of fact and law.

REASONS FOR GRANTING THE WRIT

A. The Law as to What Constitutes "Vesting" and "Taking" Under the Fifth and Fourteenth Amendments is Unsettled

This case presents a unique opportunity to this Court to establish clear guidelines for what is presently a significant—but, unfortunately, vague—area of constitutional law involving literally hundreds of millions of dollars of construction projects throughout the entire nation every year and, in the process, correct a manifest injus-

tice resulting from the decision of the Ninth Circuit Court of Appeals.

Legal commentators have repeatedly emphasized the unfortunate conditions that prevail because of the lack of action, or apparently inconsistent action, taken by this Court in the past. Thus, the author of *American Planning Law, Land Use and the Police Power,* has stated that the failure of the United States Supreme Court to participate in the development of what constitutes a compensable "taking" under the Fifth and Fourteenth Amendments is the single item "primarily responsible" for the confusion in this area. The author goes on to say that: "This part of the law has suffered heavily thereby." Williams, American Planning Law, Land Use and the Planning Power, Volume I, Section 4.04, at pages 93-94)

The comment in the ALR annotation following the decision of *Penn Central Transportation Company v. City of New York,* 438 U.S. 104, 57 L.Ed. 631, 98 S.Ct. 2646, (reh. den.) 58 L.Ed.2d 198, 99 S.Ct. 226 (1978) states: ". . . the Supreme Court has not been very precise in defining what constitutes a 'taking' of private property compensable under the Fifth Amendment." 57 L.Ed. 1254, at 1257 (1978)

Joseph Sax, in *Takings and the Police Power* (74 Yale Law Journal 36 (1964)) refers to the "crazy quilt pattern of Supreme Court doctrine" on the taking problem.

One of the most recent commentaries is that contained in a Harvard Law Review Note, 94 Harvard L.R. 1 (Nov., 1980) in which the author states: "Judicial interpretation of the 'takings' of the Fifth Amendment is notoriously confused."

This Court could not address the problem of "taking" in *San Diego Gas & Electric Company v. City of San Diego,* 450 U.S. 621, 67 L.Ed.2d 551, 101 S.Ct. 1287 (1981) as it determined that there was not a "final" state court

judgment which determined the necessary issues to give this Court jurisdiction. Such is not the case here. The California Court of Appeal, in the companion case referred to above, decided the issue against Petitioners squarely, as it determined—erroneously in Petitioners' view—that no taking had in fact occurred, notwithstanding that the Petitioners had expended literally years of labor and more than $200,000.00 of costs and investments in construction pursuant to three separate permits. This companion case was expressly referred to, and formed the basis of, the Ninth Circuit's decision. (Appendix A, p. A-2, 3)

In *Penn Central Transportation Company v. City of New York, supra,* this Court determined that no "taking" had occurred by the application of the New York Landmarks Preservation Law to the subject property by holding, *inter alia,* that the law did not interfere with the present uses of the building, but allowed the owner to continue using it as had been done in the past, thereby permitting the owner to profit from the building and obtain a reasonable return on its investment. *Id.* at pp. 135, 655.

In this case, having stripped 33 acres of prime agricultural land of mature grape vines, and having, by trenching, laying, back-filling and compacting over one-half mile of underground sewer and water lines, much of which would have to be dug up to permit reversion to agricultural use, and a 3-4 year wait before vines could again become commercially productive, the Petitioners in this case are in a far different situation from the owners of Grand Central Terminal in the *Penn Central* case. Here, the owners' action *in reliance* on 3 separate permits *has* prevented them from using their land, or making a profit from it.

In *Avco Community Developers, Inc. v. South Coast Regional Commission,* 17 Cal.3d 785, 132 Cal.Rptr. 386

(1976) certiorari was denied by this Court at 430 U.S. 952, 51 L.Ed.2d 801, 97 S.Ct. 1594 (1977). In that case this Court let stand a decision by the California Supreme Court to the effect that vested rights could *not* have been created in the property owner-developer as building permits for the structures which would involve the greatest outlay of funds for the project had not yet been obtained; therefore, the project was subject to the jurisdiction and requirements of the South Coast Regional Commission. In this case, as more than 90% of the expense of constructing a mobile home park is *not* involved in the matter of building permits for the relatively incidental laundry and restroom facilities, the issue of *when* a vested right *first* arises may be squarely faced and determined.

The "vesting" and the "taking" issues are clearly presented in Petitioners' case notwithstanding the fact that Petitioners are seeking damages, for the determination that Petitioners *did* acquire a vested interest by substantial construction of improvements under three separate valid and final permits issued by the Fresno County Planning Department and the State of California Department of Housing and Community Development is essential to the causes of action for damages.

Petitioners therefore seek a determination that, based upon such "vesting" and "taking", the action of the Board of Supervisors of Fresno County in revoking their permit, and that of the Ninth Circuit Court of Appeals in affirming that action by sustaining the orders granting summary judgment and dismissal of the Complaint, thus depriving them of the opportunity of completing a mobile home park which is more than 80% completed in its first phase, be vacated.

B. Petitioners' Property Rights Had "Vested" Prior to Fresno County's Action in Revoking Their Permit

The granting of this Petition will enable this Court to address two significant, important questions of constitu-

tional law, having wide applications among the 50 states: The first is the governmental action necessary, and the property owner's actions in reliance thereon, which will constitute a "vesting" of property rights sufficient to require constitutional recognition under the Fifth and Fourteenth Amendments. The second relates to the nature and extent of governmental activity which may be deemed a "taking" of those property rights. Only if *both* of these questions are answered in favor of the property owner is it necessary, in any given case, to address the question of whether the action categorized as a "taking" should be set aside,[1] or whether, depending upon the option of the governmental agency or the remedies sought by the property owner, "just compensation" should be determined and paid.[2]

Petitioners submit that this is a clear case in which "vesting" of property rights *has* occurred within the ambit of United States Constitutional protection, contrary to the opinion of the Court of Appeals below. (Appendix A)

The facts of the issuance of three separate permits to the Petitioners by the Planning Department of Fresno County on September 1, 1971 (Appendix M) and by the State of California on December 18, 1972, are undisputed. (Appendix N)

Likewise, there can be no doubt that the Petitioners incurred substantial economic loss in reliance on these permits by clearing their land of 33 acres of valuable grape-producing vines. The Petitioners' valuation of $80,000.00 of value for the vines, and $2,500.00 for the clearing of them from 33 acres, remains undisputed on the record.

---

[1]See *Dobbins v. Los Angeles*, 195 U.S. 223, 49 L.Ed. 169 (1904).

[2]See *Agins v. Tiburon*, 447 U.S. 255, 65 L.Ed. 106, 100 S.Ct. 2138 (1980).

In addition, although the County of Fresno and its representatives asserted that from *looking at the land* they could not see substantial improvements to the property other than grading, roadways, drainage and construction of masonry walls, the evidence is undisputed that the Petitioners installed more than 1,400 feet of sewer line, and more than 1,400 feet of water line, and had all of said improvements inspected, approved and "signed off" by State of California Representatives.

Although there is some dispute as to the exact dollar amount expended, whether it be the sum of almost $200,000.00 sworn to by the Petitioners, or any lesser amount, the economic considerations are substantial in any event. See *Dobbins v. City of Los Angeles, supra,* in which the expenditure of $2,500.00 was deemed sufficient to warrant constitutional protection. It goes without saying that the value of 33 acres of producing grape vines destroyed; the value of installation of over one-half of a mile of sewer and water pipes; and the value of grading and constructing streets, drainage facilities and landscaping is utterly wasted . . . perhaps "forfeited" would be a more apt word . . . if the Petitioners are to be bound by a zoning change permitting only agricultural uses in the future and if they are not permitted to pursue damage claims against those causing such losses.

One of the reasons that the area of the law relating to "vesting" remains in a state of confusion, notwithstanding substantial economic expenditures in reliance on governmental acts, has been the rather myopic treatment of the *necessity* for *a building permit for structural construction,* whether or *not* it bears any economic relationship to the project which has received governmental sanction. Thus, in *Avco, supra,* notwithstanding years of time and millions of dollars of expenditures, the California Supreme Court held that no vesting took place as the number, height

and precise location of structures had *not* been identified and approved in a building permit. In Petitioners' case, the Site Plan *did* set forth the number, height and precise location of each structure.

Petitioners are *not* asserting that a property owner has a contractual right to a given zoning classification *vis-a-vis* his city, county, or state. In certain circumstances, where the nature and extent of structural construction of scores of single units or multi-story condominiums, or commercial or industrial buildings is involved, the denial of "vesting" may be appropriate if the number and design of these buildings, including height limitations and architectural treatment, has *not* been approved by the appropriate governmental agency. In such cases, where the ratio of site preparation costs to total construction costs is *small,* a holding of lack of "vesting" in terms of constitutionally protected rights may well be appropriate. But where, as here, over 90% of the value of the project, including site preparation and construction involved matters *other* than the construction of buildings—limited here to laundry and sanitary facilities—due process requires the determination of a standard different from the slavish veneration of an above-ground building permit requirement.

An analogy might be drawn to the hypothetical case of a multi-million dollar golf course adjacent to a hotel built years before in an unrelated phase of commercial development. Is there to be no constitutional recognition of "vesting" if a zoning change is made by the governmental entity *after* the construction of the golf course, but before the caddie shack has been constructed pursuant to a building permit? By using the present case as a vehicle to bring light to a "notoriously confused" area of the law, guidelines may be established that will be of fundamental importance to governmental entities and developers throughout the nation.

Although this Court has not yet ruled that a building permit is *not* a *sine qua non* for vesting, certain state courts have.

Thus, in *Raley v. Cal. Tahoe Regional Planning Agency*, 68 Cal.App.3d 965, 975, 137 Cal.Rptr. 699, 705 (1977) the Court of Appeal, Third District, observed that "Several decisions intimate that a building permit may no longer be *sine qua non* of a vested right if preliminary public permits are sufficiently definitive and manifest all final discretionary approvals required for completion of specific buildings." (Citing *Aries Dev. Co. v. California Coastal Zone Conservation Comm.*, 48 Cal.App.3d 534, 122 Cal.Rptr. 315 (1975), and others. In *Friends of Lake Arrowhead v. San Bernardino County Board of Supervisors*, 38 Cal.App.3d 497, 509, 113 Cal.Rptr. 539, 546 (1974) where plaintiffs urged that "substantial construction" within the meaning of the California Environmental Quality Act could not have been performed prior to institution of the proceeding on December 1, 1972, because a building permit was not issued until about November 27, 1972, the Court of Appeal stated that "The assumption that construction must be in reliance upon the issuance of a building permit is devoid of merit." Approval of a tentative tract map and a *site development plan* constituted "other entitlement for use" and the performance of grading and the construction of a retaining wall, which did not require a building permit, and the incurring of substantial liabilities for construction and material, were held to have satisfied the "substantial construction" requirement.

C. The Action of Fresno County in Revoking the Petitioners' Right to Complete Their Mobile Home Park Was an Unconstitutional "Taking"

If this Court grants certiorari and subsequently determines that there was no "vesting," then, of course, there can be no "taking" of a constitutionally protected property right. Petitioners submit, however, that "taking" did in

fact exist under the circumstances of this case, and that the decision of the Court of Appeals was contrary to decisions of this Court.

Thus, in *Kaiser Aetna v. United States*, 444 U.S. 164, 62 L.Ed.2d 332, 100 S.Ct. 383 (1979) this Court held that a "taking" occurred when the private property owner substantially altered Kuapa Pond from its natural state. In *Kaiser*, this Court ruled that even the exclusion of others was "universally held to be a fundamental element of property rights." (444 U.S. at 179-180) If the entrance of sailboats or small pleasure craft into a navigable pond is an unconstitutional "taking" as to a private property owner who might possibly suffer reduced valuation of his real estate development adjacent to the body of water, certainly the drastic action of changing the zoning after the first phase of a mobile home park is 80% complete and leaving the property owner with a series of streets, walls, and underground utilities which would have to be ripped out to make the land productive is even *more* of a "taking" by governmental action.

The facts in this case are far from the absence of "taking" found by this Court to exist in *Agins, supra*, where the Court held that the zoning ordinance in question neither prevented the best use of the owner's land, nor extinguished a fundamental attribute of ownership. In the *Agins* case the property owner had *not* submitted *any* plan for development of his property, but was attacking the zoning ordinance in question as an unconstitutional taking without regard to the nature of plans to be presented. In *this* case, Petitioner Soojian had specific, detailed plans approved by Fresno County when Site Plan No. 1507 was granted on September 1, 1971, and by the State of California the following year. Construction of Phase I of the mobile home park was 80% complete at the time Fresno County took administrative action deeming the previously-issued permit "void", and thereafter revoking it.

A review of the effort necessary to restore Petitioners' land to its former agricultural state demonstrates the extent of the "taking" here, and the necessity for redress in the form of money damages.

If the action of the Board of Supervisors and the Ninth Circuit Court of Appeals is *not* overturned, each and every one of 56 vertical sewer and water pipes to each separate trailer pad would have to be removed; a substantial portion of the water and sewer systems would have to be excavated and removed to enable farming operations to be resumed, for otherwise such pipes would prevent plowing and disking operations; substantial portions of the water and sewer system would be abandoned as useless where they were buried at deeper levels beneath the ground; and more than one hundred feet of masonry walls 6 feet high would have to be removed.

Perhaps most significantly, in terms of economic loss, to restore the land to the producing status it had before the grape vines were cleared *in reliance on the permits* would require substantial additional costs for new vines, labor to plant them, and labor, fertilizer and machinery use for four full years before they could again become productive. In this respect, the Petitioners' situation in regard to the "taking" is markedly different from other developers who still have their land available for immediate use if a particular construction project has been denied to them

Are all of these losses—based on Constitutionally-protected rights and the Civil Rights Acts—to be borne without access to any forum which will hear Petitioners' evidence as to their damage?

D. The Opinion of the Ninth Circuit Court of Appeals Is Directly Contrary to This Court's Decision in Dobbins v. Los Angeles

This Petition for Certiorari bears significant similarity to the factual situation in *Dobbins v. Los Angeles, supra.* In *Dobbins* the Petitioner had "nearly completed" the foundations of a gas works at the time the City of Los Angeles passed an ordinance amending the boundaries of a territory within which a gas works was permitted. Thus, in that case, as in this, substantial below the ground work was completed, but not the extensive structures which normally constitute the bulk of building construction costs. This Court unanimously determined that, under the circumstances of that case, the unlawful interference with vested property rights could not be acquiesced in, and referred the matter to the California Superior Court with directions to grant a trial of the issues.

Dobbins is, therefore, a *clear* statement of what constitutes an *impermissible* taking under the Fifth and Fourteenth Amendments to the Constitution.

Although the *Dobbins* case has been cited in numerous lower federal court and state court decisions, it has not been cited by this Court since 1935, and then only in reference to the invalidating of a statute by virtue of changing circumstances. *Nashville, C. & St. L.R. Co. v. Walters,* 294 U.S. 405, 79 L.Ed. 949, 555 S.Ct. 478 (1935). The Ninth Circuit opinion brushes *Dobbins* aside by calling it a "turn of the century Supreme Court decision." (Appendix A, p. A-3) Because *Dobbins* is a landmark decision, it is important that this Court reaffirm—or modify, if need be—its holding after a period of 78 years.

E. The Opinion of the Ninth Circuit Court of Appeals Is Directly Contrary to This Court's Decision in Maine v. Thiboutot

The Memorandum Opinion of the Ninth Circuit Court of Appeals completely misstates the fundamental basis of Petitioners' Complaint. In doing so, it looks to California law, rather than addressing the fundamental question of whether Federally-protected Constitutional rights, and Congressional statutes, have been violated by the Respondents.

Thus, the Ninth Circuit states: "The principal issue in this appeal is whether Soojian had a vested right under California law to build a mobile home park based on this site plan approval." (Appendix A, pp. A-1, 2) This view of the case is also obvious from the Ninth Circuit language: ". . . we withdrew this case from submission pending final resolution of the state law questions in the California Court of Appeal. That Court's opinion has now been filed." (Appendix A, p. A-2)

Thus, rather than reaching its own decision as to the Federal Constitutional and statutory rights invoked by the Petitioners' Complaint, the Ninth Circuit looked no further than the erroneous decisions of the California Courts. By so doing, the issues of the rights guaranteed by the United States Constitution were ignored and fell by the wayside.

If such a course of conduct in judicial proceedings were followed throughout the fifty states, then the guaranties of due process found in the self-executing provisions of the Fifth and Fourteenth Amendments to the United States Constitution would be nullity in this area of law, and would be superceded by fifty disparate state concepts as to what due process constitutes in the guaranteeing of property rights for persons in the United States.

The error of the Ninth Circuit is clearly shown by the decision of this Court in *Maine v. Thiboutot*, 448 U.S. 1, 65 L.Ed.2d 555, 100 S.Ct. 2502 (1980), in which it was expressly held that *all* claims alleging deprivation of *any* federal right, Constitutional or statutory, constitute causes of action under 42 U.S.C. Sec. 1983. Indeed, where there is no other express statutory remedy, *Maine v. Thiboutot* held that 42 U.S.C. Sec. 1983 provides "the *exclusive* statutory cause of action." (100 S.Ct. at 2504) Without such a federal court remedy, there can be no assurance that any person can "both enjoin future deprivations and recover the value of those rights already taken." (See 94 Harvard Law Review, The Supreme Court, 1979 Term, p. 229)

Finally, the Ninth Circuit stated: "Since the California Courts have held that Soojian did not have a vested property right at the time of the revocation, the opportunity to seek substantive due process review does not arise." (Appendix A, p. A-3) If this view is sustained, then there was no basis for this Court's even accepting certiorari in *Penn Central Transportation Company v. City of New York, supra; Kaiser Aetna v. United States, supra; Agins v. Tiburon, supra; and San Diego Gas & Electric Company v. City of San Diego, supra.*

F. Fundamental Constitutional and Statutory Civil Rights Should Not Be Nullified by the Device of Granting a Motion for Summary Judgment, and Dismissal of a Complaint, Before the Opportunity of Discovery Under the Rules of Civil Procedure Can Be Availed Of

Discovery is a fundamental right of every litigant in the federal courts. Without these rights, as provided by the Federal Rules of Civil Procedure, Rules 26-37, a litigant is both blind and helpless. This is particularly true in cases in which the violation of Constitutional and civil rights is sought, and in which the proof of conspiratorial conduct is necessary.

The proceedings in the District Court, as condoned and affirmed by the Ninth Circuit, constitute a shocking violation of elementary procedural due process.

In the District Court, the respondents, in their Pretrial Statement, acknowledged that there were at least ten "Disputed Factual Issues." They nevertheless thereafter filed a motion for summary judgment under F.R.C.P., Rule 56(b), for summary judgment as to all of Petitioners' four causes of action. The Petitioners had previously timely served written interrogatories on the Respondents pursuant to F.R.C.P., Rule 33, and had timely noticed depositions pursuant to F.R.C.P., Rule 30.

Notwithstanding the fact that F.R.C.P., Rule 56(c), expressly refers to "answers to interrogatories," and that F.R.C.P., Rule 56(e) expressly provides that "the court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits," the magistrate who had been assigned to hear the matter ruled that the Respondents did *not* have to answer Petitioners' written interrogatories, and did *not* have to attend depositions. The Petitioners' request for a continuance to complete this discovery was summarily denied. (Appendix E, p. A-14)

Although this course of conduct by the magistrate was brought to the attention of the District Court judge by Petitioners' objection thereto, in which they specifically requested time to complete discovery (Appendix E, p. A-14), he nevertheless condoned this conduct by accepting the magistrate's findings and conclusions (Appendix D) and based the District Court Order (Appendix C) and Judgment (Appendix B) thereon.

G. The Respondents, Charged With Violations of Constitutional Rights and the Civil Rights Acts, Including Individual Conspiratorial Conduct, Must Be Responsible In Damages

In addition to the other causes of action based upon the self-executing provisions of the Fifth and Fourteenth Amendments to the United States Constitution, the Petitioners have asserted their rights to monetary damages in their Complaint under 28 U.S.C. Sec. 1331; 42 U.S.C. Sec. 1983; conspiracy under 42 U.S.C. Sec. 1985(3); and 42 U.S.C. Sec. 1986.

Whatever immunity, qualified or absolute, the Respondents might have as individuals under general Constitutional provisions previously enunciated by this Court, when they are charged with individual, conspiratorial activity, the Petitioners' right to recover damages sustained as a result of such conspiratorial activity must prevail over any immunity doctrine.

There has been much discussion concerning the difference between the liabilities of municipalities and counties on the one hand, as determined by this Court in *Owen v. City of Independence*, 445 U.S. 622, 63 L.Ed.2d 673, 100 S.Ct. 1398 (1980), and the qualified immunity for various public employees discussed in *Owen, supra*, at 1408-1409, and *Wood v. Strickland*, 420 U.S. 308, 43 L.Ed.2d 214, 95 S.Ct. 992 (1975).

Petitioners submit that this is a distinction without a difference, at least so far as the principal respondents in this case are concerned. As Justice Brennan so aptly put it, "a municipality has no 'discretion' to violate the Federal Constitution." (*Owen, supra*, at 1415)

In the State of California, Government Code Section 25042 provides as follows:

> Any supervisor who (a) refuses or neglects to perform any duty imposed on him, without just cause, or (b) wilfully violates any law provided for his govern-

ment as a supervisor, or (c) fraudulently or corruptly performs any duty imposed on him, or (d) wilfully, fraudulently, or corruptly attempts to perform an act as supervisor which is unauthorized by law, in addition to any other penalty prescribed by law, forfeits to the county five hundred dollars ($500) for every such act, to be recovered on his official bond, and is further liable on his official bond to any person injured thereby for all damages sustained.

As it is obvious that the County of Fresno pays for its supervisors' official bonds, the Petitioners respectfully submit that in this case (and, probably, throughout the United States) an *alleged difference between "municipal" or "individual" liability is utterly illusory.* The Constitutional and statutory rights of citizens to be free from illegal deprivation of their civil rights should not stand on mere hair-splitting. Once the full extent of indemnification provided under county and city fidelity bonds is apparent, Petitioners submit that the imposition of "individual" responsibility on the part of county officials will *not* be deemed "so onerous as to paralyze the government official's decisiveness and distort . . . his judgment on matters of public policy." (*Owens,* 100 S.Ct. at 1418)

CONCLUSION

This Petition for Certiorari presents an unusual opportunity for this Court to resolve the present unsettled and confusing state of the law concerning matters which are of fundamental importance to state and local governments, and hundreds of developers, large and small, throughout the nation. Inasmuch as there have been final judgments by California lower and appellate courts, and these judgments were the bases for the Judgment of the District Court and the Opinion of the Ninth Circuit Court of Appeals, and inasmuch as the issues of "vesting" and "taking" were extensively treated in a series of hearings

before the Fresno County Board of Review and the Fresno County Board of Supervisors, all aspects of these vital issues are now available for this Court to address. The piecemeal consideration necessitated by the limited facts of other cases heretofore considered by this Court do not apply here.

No less important is the securing of uniformity throughout the circuits by a re-affirmation of this Court's decision in *Maine v. Thiboutot;* the opportunity to renounce any attempt to thwart the Civil Rights Acts by the device of preventing essential discovery as contemplated by the Federal Rules of Civil Procedure; and an opportunity to review in a pragmatic, rather than an abstract sense, the illusory difference between "municipal" and "individual" liability in damages, in a context where liability bonds preclude actual individual "liability" in any meaningful sense of the word.

Dated: July, 1982.

Respectfully submitted,

WILLIAM M. HARDY
COUNSEL OF RECORD
CLARK A. BARRETT
Attorneys for Petitioners

(Appendices follow)